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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 5, 2003

VIACOM

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Ex Parte Notice – MB Docket No. 02-277 ; MM Docket No. 01-317 ; MM Docket No. 00-244

Dear Ms. Dortch:

On May 2, 2003, Anne Lucey of Viacom/Infinity, Meredith Senter of the law firm of Leventhal, Senter & Lerman, and Daniel Ryson of the engineering firm of Cavell, Mertz & Davis met with Paul Gallant of the Media Bureau and Nandan Joshi of the Office of General Counsel to discuss a proposed radio market definition as detailed in the attached written presentation.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter, as well as two copies of the written presentation are hereby submitted for each docket.

Sincerely,

Anne Lucey

Anne Lucey

Attachment

cc: Paul Gallant (w/o attachment)
Nandan Joshi (w/o attachment)
Linda Senecal
Mania Baghdadi
Qualex International

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DATA IN SUPPORT OF

MODIFIED METHODOLOGY FOR COUNTING

THE NUMBER OF STATIONS IN A RADIO MARKET

(MB Docket No. 02-277; MM Docket No. 01-317; MM Docket No. 00-244)

Submitted by
Viacom Inc. and Infinity Broadcasting Corporation

May 1, 2003

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Introduction and Summary

Viacom Inc. ("Viacom") continues to advocate, as more thoroughly explained in its comments in this proceeding, that the radio local ownership rule should be repealed in its entirety.[1] Nevertheless, Viacom is submitting data regarding the number of radio stations in 24 markets in which Infinity Broadcasting Corporation ("Infinity") owns and operates stations in support of a modified methodology for counting the number of stations in a radio market.[2] The number of radio stations in these Infinity markets has been compiled using the following methodologies:

- Current Contour Overlap Methodology. The current FCC methodology determines the relevant radio market encompassed by overlapping principal community contours of commonly owned radio stations and then counts every radio station with a principal community contour that intersects any portion of the contour-defined radio market.[3] (This methodology does not count noncommercial radio stations.)

- Arbitron Metro-Based Methodology. This methodology counts the number of radio stations licensed to communities within any of the designated Arbitron Metro counties, regardless of market share. (This methodology includes commercial and noncommercial stations.)[4]

1 *See* Comments of Viacom Inc., MM Docket Nos. 01-317 & 00-244, filed Mar. 27, 2002, at 21-32.

2 Infinity currently owns and operates radio stations in 43 separate Arbitron radio markets, ranging from New York, NY – Arbitron's No. 1 ranked market – to Palm Springs, CA – Arbitron Market No. 162. The Infinity markets that were excluded from this data compilation are: Chicago, IL; Dallas-Ft. Worth, TX; Boston, MA; Detroit, MI; Seattle-Tacoma, WA; Minneapolis-St. Paul, MN; San Diego, CA; St. Louis, MO; Pittsburgh, PA; Cleveland, OH; Kansas City, MO-KS; San Antonio, TX; Columbus, OH; Austin, TX; Greensboro-Winston Salem-High Point, NC; Buffalo-Niagara Falls, NY; Fresno, CA; Victor Valley, CA; and Palm Springs, CA.

3 Under the current FCC methodology – unlike the alternative Arbitron Metro-based methodologies, the definition of the various radio markets is unique to Infinity because each "radio market" is defined based on the overlapping contours of commonly owned Infinity radio stations.

4 For clarification, this Arbitron Metro-Based Methodology does ***not*** simply count those stations listed in the Arbitron Radio Market Report (the so-called "Arbitron Book"). The Arbitron Book includes only commercial radio stations that have satisfied certain minimum reporting standards – specifically, (1) credit for five or more minutes of listening in a quarter-hour in at least 10 Metro diaries, (2) Metro cumulative listing ("Cume") rating of 0.495 or greater, and (3) Metro Average Quarter Hour (AQH) rating of 0.05 or greater.

- Supplemented Arbitron Metro-Based Methodology. This methodology includes the same stations as the Arbitron Metro-Based Methodology above, but also includes out-of-market commercial and noncommercial stations that have a reportable share in the radio Metro in question. For purposes of this methodology, a station is deemed to have a reportable share in the Metro if the station has an Average Quarter-Hour (AQH) Share of 0.1 or greater, based on most-recent all day (9:00 a.m. – midnight) 12+ audience, as reported by Arbitron in the Maximi$er database.[5] (This methodology also includes commercial and noncommercial stations.)

Advantages of Supplemented Arbitron Metro-Based Methodology

As the data reveal, the Arbitron Metro-Based Methodology, supplemented to include noncommercial stations and out-of-market stations with a reportable share in the Metro, represents a more realistic approach to defining a "radio market" by more accurately reflecting the diversity of radio viewpoints and radio programming available in a given market. This approach is superior to the current, contour-based methodology, which results in a unique market definition for each owner. Under the Abitron Metro-Based Methodology, the number of stations in a radio market will be more uniform for all group owners in that Metro market. Under the current contour-based approach, group owners with powerful station signals are able to include far more radio stations in their "markets" than owners of stations with less powerful signals in the same market. Hence, this Arbitron Metro-Based Methodology prevents the artificial inflation of market size possible under the current contour-based methodology when one of the commonly owned stations has a large principal community contour.

5 An AQH Share of 0.1 is the minimum share reported by Arbitron. The AQH Share is the percent of the total listening audience tuned into each station and reflects the share of listening each station captures out of the total listening in the survey area. To be included in the Arbitron Maximi$er database, a station must have received credit for five or more minutes of listening in a quarter-hour in at least 10 Metro diaries.

Include All Stations Within the Metro. The inclusion of all commercial radio stations licensed to communities within the Arbitron Metro, regardless of whether the stations satisfy the minimum reporting standards for inclusion in the Arbitron Radio Market Report (the so-called "Arbitron Book"), reflects the actual options available to the listeners, as well as the actual market conditions facing the station group in question. As the Commission previously recognized when it rejected the use of the Arbitron Book for defining the number of stations in a market, excluding stations that do not satisfy the Arbitron minimum reporting standards fails to count stations that serve limited or specialized audiences and thus would underestimate the full diversity of voices available in a particular radio market.[6] Indeed, the short-comings of defining a radio market based solely on the stations reportable in the Arbitron Book is aptly demonstrated in the Baltimore market. Infinity's two AM stations in Baltimore – WBGR(AM) and WBMD(AM) – are excluded from the Arbitron Book for the Baltimore Metro. Yet these stations are licensed to Baltimore itself, their signals cover the city of Baltimore, and the stations serve niche audiences (gospel and religious programming) and thus are clearly sources of programming and viewpoint diversity. This methodology of counting all stations in the Arbitron Metro also harmonizes the local radio ownership rule with the current local television ownership rule, which recognizes all independently owned television stations assigned to the DMA in question regardless of their viewership.[7]

Include Noncommercial Stations. Unlike the current FCC methodology, this approach also takes into account noncommercial stations that offer unique, divergent

6 *See Revision of Radio Rules and Policies*, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 FCC Rcd 6387, 6395, para. 40 (1992).

7 *See* 47 C.F.R. § 73.3555(b)(2).

viewpoints to the public and often garner significant audience share, but are not reported in the Arbitron Book.[8] As recently reported, noncommercial station KQED(FM), San Francisco, is rated No. 2 based on the Fall 12+ share, behind ABC Radio's KGO and ahead of Viacom/Infinity's KCBS. Yet KQED, as a noncommercial station, is not reported in the Arbitron Book for San Francisco and is not counted using the Commission's current methodology.[9] Similarly, in the Washington, D.C. market, the current FCC methodology excludes WAMU(FM) (owned by American University and featuring NPR, news/talk and bluegrass), WCSP-FM (owned by National Cable Satellite Corp. and featuring C-Span and public affairs), WETA(FM) (owned by Greater Washington Educational Telecommunications Association and featuring public broadcasting, NPR), and WPFW(FM) (owned by Pacifica Foundation and featuring jazz, news/talk, world music).

The inclusion of noncommercial stations would harmonize the local radio ownership restriction with the other local ownership restrictions because the Commission already includes noncommercial stations for purposes of counting the number of voices in a market under the current local television ownership rule and the radio/television cross-ownership rule.[10]

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8 *See Revision of Radio Rules and Policies*, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 FCC Rcd 6387, 6395, para. 39 (1992) (Commission "agree[ing] that non-commercial stations represent an additional voice in terms of traditional diversity concerns").

9 *See Who's Really #1 in San Francisco's "War Book"? Non-Com King Kong KQED*, Inside Radio, Apr. 28, 2003, at 1.

10 *See* 47 C.F.R. § 73.3555(b)(2)(ii) (counts full-power commercial and noncommercial TV stations in the post-merger voice count for the local television ownership restriction); 47 C.F.R. §73.3555(c)(2)(i)-(ii) (counting full-power broadcast TV stations and broadcast radio stations for purposes of determining the media voices in a market under the radio/television cross-ownership rule).

Include Out-of-Market Stations with Reportable Share. Similarly, counting out-of-market radio stations with a minimum reportable Arbitron share in the Metro in question – regardless of whether the station is licensed to a community within the Metro – is consistent with the approach to counting media voices under the radio/television cross-ownership rule.[11] If these out-of-market radio stations are not included in the count, stations that actually compete for listeners in the Metro are completely ignored. For example, in the Atlanta Metro – WALR-FM and WBTS(FM) – are ranked among the top-10 ranked stations in the Metro. Yet these stations are not licensed to cities within counties in the Atlanta Metro. Failure to include these out-of-market stations in the count of stations in the market would ignore marketplace realities. Indeed, in 1992 when the Commission relaxed the local radio ownership restriction, the Commission counted those stations rated by Arbitron in the Metro, even though these stations might not be licensed to communities within the Arbitron metro.[12]

This approach is also more inclusive than just adding out-of-market stations that Arbitron designates as "home" to the Metro. Counting only those out-of-market stations with a reportable share that are "home" to the Metro market would dramatically underestimate the diversity of radio voices and programming available in a Metro market. For example, in the Riverside-San Bernardino Metro, six of the top-10 rated stations are out-of-market stations that are "home" to the Los Angeles Metro and licensed to communities in the Los Angeles Metro. The news/talk station KFI(AM), Los Angeles,

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[11] *See* 47 C.F.R. § 73.3555(c)(3)(ii)(A)(2) (counts independently owned out-of-market radio stations with a minimum Arbitron-reported share for purposes of determining the media voices in a market for the radio/television cross-ownership rule).

[12] *See Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2778, para. 45 & n.100 (1992).

CA, is rated 3rd in the Riverside-San Bernardino Metro. KSSE(FM), Arcadia, CA, KSCA(FM), Glendale, CA, KKBT(FM), Los Angeles, CA, KTWV(FM), Los Angeles, CA, and KIIS-FM, Los Angeles, CA, are rated 5th and 7th – 10th in the Riverside-San Bernardino Metro respectively. Excluding these out-of-market stations that garner a significant share of the listening audience from the total number of stations in the Riverside-San Bernardino Metro clearly would fail to reflect the realities of this radio market. The Commission therefore should reject any proposal to exclude from the count of stations in a market (*i.e.*, exclude from the denominator) out-of-market stations that are not "home" to the Metro in question.

Markets Not Located in Arbitron Metros. As is the case under the current radio/television cross-ownership rule, in areas where there is no Arbitron Metro market, the radio market would consist of those radio stations present in an area that would be the functional equivalent of an Arbitron Metro market.[13] If an applicant is unable to demonstrate the functional equivalent of an Arbitron Metro market, the default geographic market would be the county in which the community of license of the station being acquired is located.

* * *

Unlike the other local ownership rules, the current radio local ownership restriction does not limit the voice/station count to independently owned and operating in-market stations. Consequently, the local radio ownership rule divides markets into tiers with larger numerical station thresholds for common ownership than the current

[13] *See* 47 C.F.R. § 73.3555(c)(3)(C); *see also* 47 C.F.R. § 73.3555(b)(2)(ii) (for purposes of the television duopoly rule, when there is no Nielsen DMA, count TV stations in the area that would be the functional equivalent of a TV market).

radio/television cross-ownership rule. For example, in radio markets with ***45*** or more commercial radio stations, a party can own up to 8 radio stations, whereas under the radio/television cross-ownership rule a party can own up to 8 outlets (2 television and 6 radio stations) if ***only 20*** independently owned and operating voices (radio, television, cable, and newspaper) would remain post-merger. In order to remain true to Congress's intent to deregulate local radio ownership, the Commission should do the following if it modifies the radio market definition. It should: (1) scale down the threshold number of radio stations for each tier; (2) include television, cable, and newspapers as other "voices"; and/or (3) ***continue to count all radio stations*** within the Arbitron Metro-defined market, not just independently owned and operating radio stations.

The table on the following page compares in 24 selected Infinity markets the number of stations Infinity would be deemed to own in the "market" (*i.e.*, the numerator) and the total number of stations in the "market" (*i.e.*, the denominator), calculated in each case under the current contour-based rule and the proposed Arbitron Metro-Based rule.

[Table on following page]

Tab No.	Arbitron Metro Name	Arbitron Metro Rank	Current Contour-Based Rule				Proposed Arbitron Metro-Based Rule						
			Infinity Numerator under Current Contour-Based Rule			Number of Commercial Stations in "Market" (Denominator) under Current Contour-Based Rule	Number of Stations Licensed to Communities Located in the Metro			Number of Out-of-Metro Stations with an Arbitron Reportable Share in the Metro			Total Number of Stations in the Metro (Unadjusted Denominator)
			Number of Infinity AM Stations	Number of Infinity FM Stations	Total Number of Infinity Radio Stations		Commercial	Non-commercial	Total	Commercial	Non-commercial	Total	
1	New York, NY	1	3	3	6	143	93	38	131	11	0	11	142
2	Los Angeles, CA	2	2	5	7	148	67	15	82	23	1	24	106
3	San Francisco, CA	4	3	5	8	166	75	28	103	23	4	27	130
4	Philadelphia, PA	6	3	2	5	82	40	19	59	33	2	35	94
5	Houston-Galveston, TX	7	2	2	4	56	52	13	65	12	0	12	77
6	Washington, DC	8	1	4	5	65	49	7	56	32	6	38	94
7	Atlanta, GA	11	1	2	3	63	62	11	73	19	3	22	95
8	Phoenix, AZ	15	0	3	3	46	41	6	47	16	0	16	63
9	Baltimore, MD	19	3	5	8	68	32	6	38	37	7	44	82
10	Tampa-St. Petersburg-Clearwater, FL	21	1	5	6	72	37	6	43	24	3	27	70
11	Denver - Boulder, CO	22	0	3	3	72	41	7	48	16	2	18	66
12	Portland, OR	24	1	5	6	55	41	10	51	13	5	18	69
13	Cincinnati, OH	26	0	4	4	37	34	10	44	15	1	16	60
14	Sacramento, CA	27	2	5	7	183	33	10	43	24	4	28	71
15	Riverside-San Bernardino, CA	28	0	2	2	77	25	6	31	52	4	56	87
16	San Jose, CA	30	3	5	8	165	18	7	25	47	10	57	82
17	Charlotte-Gastonia-Rock Hill, NC-SC	37	2	5	7	79	36	6	42	35	11	46	88
18	Orlando, FL	38	0	3	3	58	26	5	31	28	6	34	65
19	Las Vegas, NV	39	2	4	6	37	31	4	35	9	2	11	46
20	West Palm Beach-Boca Raton, FL	47	0	5	5	70	22	3	25	45	7	52	77
21	Memphis, TN	48	1	2	3	46	40	9	49	20	2	22	71
22	Hartford-New Britain-Middletown, CT	49	1	3	4	61	16	9	25	42	6	48	73
23	Rochester, NY	54	0	4	4	26	33	16	49	30	5	35	84
24	Ft. Pierce, FL	111	0	5	5	70	21	5	26	20	2	22	48

Application of the Radio Local Ownership Rule Using the Modified Counting Methodology

Viacom submits that the local radio ownership methodology set forth in this section would more accurately reflect marketplace realities. It would be easier to apply than the current contour-based rule. It would also solve the so-called "Pine Bluff" problem.

- Overlapping Contours Trigger the Rule. As with the television duopoly rule, compliance with the radio local ownership rule would be triggered by any overlapping principal community contours within an Arbitron Metro. This is the only time contours would be examined. Contours would not be used for any other purpose.

- Calculation of the "Numerator." The number of stations commonly owned by a group owner in a market would include only those stations that are "home" to the Metro market in question, as determined by Arbitron, *or licensed to a city within the Metro market in question.* If it is unclear as to which market Arbitron assigns a station, a station will be deemed to be "home" to the Metro market in which its community of license is located.

- "Home" Metro Different Than Metro of Community of License. If the station to be acquired is licensed to a city located in a different Arbitron Metro than its designated "home" Metro, the commonly owned group would be analyzed for compliance with the numerical limits both in the Arbitron Metro where its city of license is located and in its Arbitron "home" market.[14] This analysis would reflect that, although a station is assigned by Arbitron to another Metro, the station is still obligated to serve the Metro in which its community of license is located.

- Embedded Arbitron Metro Markets. If a station is "home" to an embedded Arbitron market,[15] then compliance with the numerical limits

[14] For example, in the case of Infinity's station WHFS, Annapolis, MD, WHFS is "home" to the Washington, D.C. Metro, but yet licensed to a community in the Baltimore Metro. Infinity's acquisition of WHFS therefore would trigger analysis in both the Washington, D.C. and the Baltimore, MD Metro markets. This approach is in contrast to the analysis for TV duopoly, which analyzes only the DMA to which the station is licensed as determined by Nielsen.

[15] An "embedded" Arbitron market is one that is located entirely or predominately within a larger Arbitron Metro Market. For example, San Jose, CA is an embedded Metro within the San Francisco, CA Metro; Nassau-Suffolk (Long Island), NY is an embedded within the New York, NY Metro; and Frederick, MD is embedded within the Washington, D.C. Metro.

also would be analyzed in the embedded Arbitron market, in addition to the larger Arbitron Metro within which the embedded market is located. Only those commonly owned stations "home" to, or licensed to a community within, the Arbitron embedded market would be included in the "numerator." Similarly, only stations licensed to communities in the Arbitron embedded market or with a reportable share in that embedded market would be counted in the denominator.

- Solution to "Pine Bluff" Problem. Under the current contour-overlap approach, anomalous results occur where a commonly owned station is counted as being in the radio market because it overlaps the contours of at least one of the overlapping stations (*i.e.*, counted in the "denominator"), but is not counted as a station owned by the group owner in the market because its contour does not overlap the contours of all the stations that define the radio market (*i.e.*, not counted in the numerator). To address this so-called "Pine Bluff" problem, commonly owned stations that are not part of the cluster of stations that triggered application of the local radio ownership rule would be excluded from the denominator in counting the total number of stations in the Metro market.

Exhibit A contains a detailed explanation of how the proposed radio local ownership rule would apply to Infinity-owned stations in seven Arbitron Metros. The following table summarizes the results of the analysis set forth in detail in Exhibit A.

Tab No.	Arbitron Metro Name	Arbitron Metro Rank	Current Contour-Based Rule				Proposed Metro-Based Rule					
			Infinity Numerator under Current Contour-Based Rule			Number of Commercial Stations in "Market" (Denominator) under Current Contour-Based Rule	Calculation of the Numerator			Calculation of the Denominator		
			Number of Infinity AM Stations	Number of Infinity FM Stations	Total Number of Infinity Radio Stations		Number of Infinity Stations Designated by Arbitron as "Home" to the Metro	Number of Infinity Stations Not "Home" But Licensed to Community in the Metro	Total	Total Number of Stations in the Metro (Unadjusted Denominator)	Less Infinity Stations Not Included in the Numerator	Total
3	San Francisco, CA	4	3	5	8	166	9	0	9	130	4	126
6	Washington, DC	8	1	4	5	65	5	0	5	94	5	89
9	Baltimore, MD	19	3	5	8	68	7	1	8	82	3	79
14	Sacramento, CA	27	2	5	7	183	6	0	6	71	2	69
16	San Jose, CA	30	3	5	8	165	2	0	2	82	5	77
20	West Palm Beach-Boca Raton, FL	47	0	5	5	70	5	0	5	77	0	77
24	Ft. Pierce, FL	111	0	5	5	70	0	2	2	48	3	45

New Tiers of Local Ownership in "Large" Radio Markets

Under the proposed Arbitron Metro-based methodology – indeed, even under the current contour-overlap methodology – many larger markets, such as New York, San Francisco, Atlanta, and Houston, have well over 60 radio stations in the market. Yet the current FCC radio local ownership rule treats these markets the same as smaller markets with 45 stations. There is no rational basis for differentiating a market with 35 stations from a market with 45 stations (which the rule currently does), but not differentiating a 45-station market from a 55-, 65-, 75-, or 95-plus station market.

Any tightening in the methodology for counting stations in a radio market will prevent manipulation of market size resulting from ownership of a station with a large principal community contour. Therefore, the Commission should not hesitate to refine further its tiered ownership limits to more accurately reflect marketplace realities. Specifically, the Commission should create new tiers of permissible local ownership above the current top 45-station tier. For example, in markets with 55 radio stations, a party should be allowed to own, operate, or control up to nine stations, not more than six of which are in the same service. In markets with at least 65 stations, the local radio cap should be lifted to ten stations. Yet another alternative would be to eliminate numerical restrictions in favor of a percentage in robustly competitive and diverse markets, such as those with 75 or more stations.

Grandfathering of Existing Station Groups

Any common ownership that would no longer be permitted as the result of any tightening in the methodology for determining the number of radio stations in a market should be permanently grandfathered.

This approach to grandfathering strikes a reasonable balance between the regulatory need to conform to the new methodology for counting stations and the need to avoid undue disruption of existing groups built in reliance on the current contour-based market definition. Many group owners have invested significant time and resources building radio clusters with the consent and approval of the Commission and the Department of Justice. These group owners have consolidated offices, studios, and station staff to take advantage of operating efficiencies in order to serve their listening audiences better. Separation of one or more stations to comply with new, more restrictive limits resulting from the modified methodology for counting stations in a market may be difficult to achieve and would disrupt these operating efficiencies.

Exception for Transfers by Will or Intestacy and Pro Forma Transfers

To the extent the Commission revises its methodology for computing the number of stations in a radio market, the Commission should retain Note 4 to Section 73.3555 of the Commission's rules. Specifically, any revised methodology for counting stations in a radio market should not be applied so as to require divestiture in the case of applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, or in the case of pro forma transfers, if no new or increased common ownership would result.